RESTORAN WONG SOLO (SHAH ALAM) SDN BHD & ORS v. KERAJAAN MALAYSIA

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[CIVIL APPEAL NO: BA-12GS-01-09-2017]
23 JULY 2021

CIVIL PROCEDURE: *Summary judgment – Appeal against – Recovery of unpaid service tax – Claim for – Restaurant carrying on business of food and drinks – Total annual sales turnover for 12 months in sum of more than RM3 million – Whether restaurant 'taxable person' providing 'taxable service' – Whether restaurant person licensed under Service Tax Act 1975 ('STA 1975') – Whether liable to pay service tax – Whether Government could recover service tax due and payable from taxable person only after person has been convicted of offence under STA 1975 – Whether Sessions Court correct in allowing Government's application for summary judgment under O. 14 of Rules of Court 2012 for claim against restaurant – Service Tax Act 1975, ss. 3, 8, 10(2), 14, 15(1), 29 & 40A*

REVENUE LAW: *Service tax – Recovery – Claim for recovery of unpaid service tax – Restaurant carrying on business of food and drinks – Total annual sales turnover for 12 months in sum of more than RM3 million – Whether restaurant 'taxable person' providing 'taxable service' – Whether restaurant a person licensed under Service Tax Act 1975 ('STA 1975') – Whether liable to pay service tax – Whether Government could recover service tax due and payable from taxable person only after person has been convicted of offence under STA 1975 – Service Tax Act 1975, ss. 3, 8, 10(2), 14, 15(1), 29 & 40A*

This was an appeal by the appellants, Restoran Wong Solo (Shah Alam) Sdn Bhd and its two directors, against the summary judgment entered against them pursuant to O. 14 of the Rules of Court 2012 ('ROC') by the Sessions Court in respect of the respondent's claim for non-payment of service tax in the sum of RM822,582.38 together with interests and costs. The first appellant operated a restaurant while the second and third appellants were the directors of the first appellant. In an audit conducted by the Jabatan Kastam Diraja Malaysia ('Customs') in 2012 on the first appellant's operations at the restaurant, the first appellant's 'z' report and daily sales report showed that the first appellant's total annual sales turnover for the 12 months period prior to September 2012 was in the sum of RM3,078,981.42. Pursuant to Group C of the Second Schedule of the Service Tax Regulations 1975 ('STA Regulations 1975'), a restaurant operating outside a hotel carrying on the business of providing and selling food and drinks, with an annual sales turnover of more than RM3 million, is a taxable person. The respondent's case against the first appellant was that it was a 'taxable person' providing 'taxable service'. Therefore, it should pay the respondent the service tax charged and levied on the first appellant for

the taxable service provided. The service charge due and payable by the first appellant for the taxable period from October 2012 to March 2015 was in the sum of RM822,582.38. The respondent issued a notice of demand ('bil tuntutan') dated 9 October 2015 for the sum of RM1,233,873.54 made up of the unpaid service tax in the sum of RM822,582.38 and penalty in the sum of RM411,291.16. The penalty was later remitted by the Minister of Finance. Thus, the claim by the respondent against the appellants was for the unpaid service tax only. The appellants failed and/or refused to pay the service tax. The respondent then proceeded to commence a civil action against the appellants at the Sessions Court for recovery of the service tax due and payable. Section 15 of the Service Tax Act 1975 ('STA 1975') states that any service tax due and payable and any penalty or surcharge payable under the Act may be recovered as a civil debt due to the Government. The appellants, in its defence and its affidavit-in-reply to the respondent's application for summary judgment, admitted that the first appellant's annual sales turnover was more than RM3 million for the 12 months prior to September 2012. The defence put forward by the appellants was that as the first appellant did not apply for a licence and was not licensed under the STA 1975, it was not a taxable person under the Act. The appellants averred in their affidavit-in-reply that as the first appellant did not collect any service tax from its customers, it was not liable to pay any service tax to the respondent. The Sessions Court Judge ('SCJ') found that the appellants did not have any defence to the respondent's claim for recovery of the unpaid service tax. He held that the issues raised by the appellants in reply to the respondent's application for summary judgment were all questions of law only. He then went on to decide on the questions of law raised by the appellants and held that pursuant to the STA 1975 and the Second Schedule of the STA Regulations 1975, the first appellant was prescribed as a 'taxable person' and was accordingly liable to pay service tax for the taxable services provided. Further, he held that pursuant to s. 17 of the STA 1975, the second and third appellants, as directors of the first appellant, were jointly and severally liable for the service tax due and payable by the first appellant. Dissatisfied with the SCJ's decision in allowing the respondent's application for summary judgment, the appellants appealed, which in essence centred on two main arguments, namely (i) although the first appellant's annual sales return in carrying on the business of providing the taxable service was more than the RM3 million threshold, it was not a taxable person as it was not licensed under the STA 1975; and (ii) the respondent could not make a civil claim against the appellants under s. 15(1) of the STA 1975 to recover the unpaid service tax without the first appellant first being found guilty of an offence under s. 29 of the STA 1975. The appellants' case was that only after this finding of guilt could the court order the first appellant to pay the service tax due and payable under s. 40A of the STA 1975.

Held (dismissing appeal):

(1) The first appellant operated a restaurant located outside a hotel providing or selling food and drinks. The provision or sale of food and drinks is a taxable service. The first appellant's annual sales turnover for providing or selling food and drink at its restaurant for the 12 months before September 2012 was RM3,078,981.42, which was above the RM3 million threshold for taxable service stated in Group C of the Second Schedule of the STA Regulations 1975. Accordingly, pursuant to s. 3 of the STA 1975, reg. 3 of the STA Regulations 1975, and Group C of the Second Schedule of the STA Regulations 1975, the first appellant, once it reached the threshold of RM3 million, became a taxable person. (paras 48 & 49)

(2) As a taxable person, that person is obliged to apply for a licence and be licensed under the STA 1975 in order to carry on its business of providing taxable services; it has to issue an invoice and receipt to its customers in respect of the taxable service provided and he must state on the invoice and receipt the charges for the taxable service provided separately from the amount of service tax payable; it has to submit its sales returns to the respondent at the end of every taxable period; and it must pay the service tax due when it becomes payable. The fact that the first appellant did not apply for a licence under s. 8 of the STA 1975 and carried out providing the 'taxable service' at its restaurant means that it was guilty of an offence against the STA 1975 (s. 29 of the Act). It does not mean that it is a non-taxable person. (paras 64 & 65)

(3) Paragraph 2 of the Second Schedule of the STA Regulations 1975 stipulates a 'taxable person' shall charge service tax on any 'taxable service'. Section 10(2) of the STA 1975 allows the taxable person to recover the service tax payable from its customer. The fact that the first appellant did not charge the service tax payable on its customers for the food and drinks sold to the customers did not mean that service tax was not payable by the first appellant. Section 14 of the STA 1975 states that the service tax chargeable on the taxable person under the Act shall be due at the time when payment is received for the taxable service provided to the customer by the taxable person. Hence, service tax was due from the first appellant at the time it received payment for the food and drinks sold from its customers. For these reasons, this court could not agree with the appellants' argument that because the first appellant did not apply for a licence, it could not collect the payment of the service tax from its customers and it was therefore, a non-taxable person. (paras 66 & 67)

(4) Section 15(1) of the STA 1975 is a provision that empowers the respondent to recover any service tax due and payable as a civil debt due to the respondent. It permits the respondent to recover the service tax due and payable by way of a civil action against the taxable person.

Whereas, s. 29 of the STA 1975 makes it a criminal offence for any person who, among others, fails or refuses to comply with the requirements in ss. 7, 7A, 8, 10, 10A, 11, 12, 14 or 19 of the Act. From the plain reading of both these sections, it is clear that s. 15(1) of the STA 1975 is a statutory provision enabling the respondent to recover any service charge due and payable by way of a civil action. And that s. 29 of the Act makes it a criminal offence for a taxable person not to pay the service charge due and payable for the taxable services provided. (paras 71-73)

(5) The appellants' argument that the wordings in s. 40A of the STA 1975 means that the respondent could not recover the amount of service tax due and payable by a taxable person as a civil debt unless the person is first convicted under s. 29 of the Act to be unsupported by the wordings in the Act. If it is indeed the intention of Parliament when it introduced s. 40A in the STA 1975 was that the respondent may only claim the service tax due and payable as a civil debt after the taxable person is convicted under s. 29, it would have made consequential amendments to s. 15 of the Act to expressly state that the respondent's right to recover from a taxable person the service charge due and payable as a civil debt to it, is subject to the conviction of the taxable person of an offence under s. 29. In the absence of such express words in the STA 1975 that the respondent's right to recover any service charge due and payable as a civil debt is subject to the criminal conviction of the taxable person, this court could not agree with the appellants' contention that in order for the respondent to bring a civil suit for the recovery of the service due and payable, the first appellant must first be convicted under s. 29 of the STA 1975 and only the court which had convicted the first appellant of the offence could order it to pay the respondent the service charge due and payable. For this court to agree with the appellants' contention, would require it to give the words in ss. 15, 29 and 40A of the STA 1975 strained and unnatural meanings. (paras 75 & 76)

Case(s) referred to:

European Asian Bank v. Punjab and Sind Bank [1983] 2 All ER 508 ***(refd)***

Lai Ted Kong v. Menteri Kewangan [2009] 5 CLJ 471 HC ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

Noh Hyoung Seok v. Perwira Affin Bank Bhd [2004] 2 CLJ 64 CA ***(refd)***

Pepper v. Hart [1993] AC 593 ***(refd)***

Perantara Properties Sdn Bhd v. JMC-Kelana Square & Another Appeal [2016] 5 CLJ 367 CA ***(refd)***

Sarawak Shell Bhd & Anor v. Menteri Kewangan [2001] 1 CLJ 694 HC ***(refd)***

SH Ahmad Noordin SH Abdullah lwn. Pengarah Kastam Negeri Johor & Yang Lain [2011] 6 CLJ 715 HC ***(refd)***

United Malayan Banking Corporation Bhd v. Pembinaan KSY Sdn Bhd & Ors [1993] 3 CLJ 612 SC ***(refd)***

Legislation referred to:
Federal Constitution, art. 145
Interpretation Acts 1948 and 1967, ss. 2(1)(e), 17A
Rules of Court 2012, O. 14
Rules of the High Court 1980, O. 14, O. 33 r. 2
Service Tax Act 1975, ss. 2, 3, 7, 7A, 8(1), (2), 10(1), (2), 10A, 11, 12(1), (2), 14(3), 15(1), 17, 19, 20(1), 29, 32, 40A
Service Tax Regulations 1975, regs. 2, 3, 4, Second Schedule, paras. 1, 2

For the appellants - Sivabalan & Goh Wan Ping; M/s Mastura Partnership
For the respondent - Khairul Nizam Abu Bakar, SFC

[Editor's note: Appeal from Sessions Court; Writ No: BA-51GS-21-11-2016.]

Reported by Suhainah Wahiduddin

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This is an appeal by the appellants, Restoran Wong Solo (Shah Alam Sdn Bhd and its two directors, against the summary judgment entered against them pursuant to O. 14 of the Rules of Court 2012 ("ROC") by Shah Alam Sessions Court in respect of the respondent's claim for non-payment of service tax in the sum of RM822,582.38 together with interest and costs.

[2] At the material time, the first appellant operates a restaurant carrying on the business of providing and selling food and drink. The second and third appellants are the directors of the first appellant.

[3] In an audit conducted by the Jabatan Kastam Diraja Malaysia ("customs") in 2012 on the first appellant's operations at the restaurant, the first appellant's "z" report and daily sales report showed that the first appellant's total annual sales turnover for the 12 months period prior to September 2012 was in the sum of RM3,078,981.42.

[4] The Service Tax Act 1975 (Act 151) ("STA 1975") stipulates that service tax shall be charged and levied in accordance with the Act on any "taxable service" provided by any "taxable person". The STA 1975 has since been repealed by the Goods and Services Tax Act 2014 (Act 762) ("GST Act 2014") and which in turn was repealed by the Goods and Services Tax (Repeal) Act 2018 (Act 805). The repealed GST Act 2014 was replaced by the Sales Tax Act 2018 (Act 806).

[5] Pursuant to Group C of the Second Schedule of the Service Tax Regulations 1975 ("STA Regulations 1975"), a restaurant operating outside a hotel carrying on the business of providing and selling food and drinks, with an annual sales turnover of more than RM3 million is a taxable person.

[6] The respondent's case against the first appellant is that it is a "taxable person" providing "taxable service". Therefore, it should pay the respondent the service tax charged and levied on the first appellant for the taxable service provided. The service charge due and payable by the first appellant for the taxable period from October 2012 to March 2015 is in the sum of RM822,582.38.

[7] The respondent issued a notice of demand ("bil tuntutan") dated 9 October 2015 for the sum of RM1,233,873.54 made up of the unpaid service tax in the sum of RM822,582.38 and penalty in the sum of RM411,291.16. The penalty was later remitted by the Minister of Finance. Thus, the claim by the respondent against the appellants was for the unpaid service tax only.

[8] The appellants failed and/or refused to pay the service tax. The respondent then proceeded to commence a civil action against the appellants at the Shah Alam Sessions Court for recovery of the service tax due and payable. Section 15 of the STA 1975 states that any service tax due and payable and any penalty or surcharge payable under the Act may be recovered as a civil debt due to the Government.

[9] The appellants in its defence and its affidavit-in-reply to the respondent's application for summary judgment admitted that the first appellant annual sales turnover was more than RM3 million for the 12 months prior to September 2012.

[10] The defence put forward by the appellants is that as the first appellant did not apply for a licence and is not licensed under the STA 1975, it is not a taxable person under the Act. The appellants averred in their affidavit-in-reply that as the first appellant did not collect any service tax from its customers, it is not liable to pay any service tax to the respondent.

[11] The learned Sessions Court Judge ("SCJ") found that the appellants did not have any defence to the respondent's claim for recovery of the unpaid service tax. He held that the issues raised by the appellants in reply to the respondent's application for summary judgment were all questions of law only. He then went on to decide on the questions of law raised by the appellants. The learned SCJ held that pursuant to STA 1975 and the Second Schedule of the STA Regulations 1975, the first appellant is prescribed as a "taxable person" and is accordingly liable to pay service tax for the taxable services provided. Further, he held that pursuant to s. 17 of the STA 1975, the second and third appellants as directors of the first appellant are jointly and severally liable for the service tax due and payable by the first appellant.

[12] Dissatisfied with the learned SCJ's decision in allowing the respondent's application for summary judgment, the appellants filed an appeal against the decision in this court.

[13] The appellants filed ten grounds of appeal in their memorandum of appeal, which in essence centres on two main arguments, namely: (i) although the first appellant's annual sales return in carrying on the business of providing the taxable service is more than the RM3 million threshold, it is not a taxable person as it is not licensed under the STA 1975; and (ii) the respondent cannot make a civil claim against the appellants under s. 15(1) of the STA 1975 to recover the unpaid service tax without the first appellant first being found guilty of an offence under s. 29 of the STA 1975. The appellants' case is that only after this finding of guilt can the court order the first appellant to pay the service tax due and payable under s. 40A of the STA 1975.

[14] Learned counsel for the appellants, Mr Sivabalan, submits that the first appellant is a non-taxable person because it is not licensed under the STA 1975. He argues that for this reason the respondent is not empowered under the STA 1975 to charge the first appellant the service tax and to make a claim against the appellants for the service tax. Mr Sivabalan says that the respondent "cannot bypass" s. 40A of the STA 1975 and make a civil claim directly against the first appellant for the service tax. As with the second and third appellants, Mr Sivabalan submits that they cannot be jointly and severally liable for the unpaid service tax as the first appellant is a non-taxable person and had not been found guilty of an offence under the STA 1975.

[15] In reply to the appellants, learned Senior Federal Counsel ("SFC") for the respondent, Encik Khairul Nizam bin Abu Bakar, submits that the STA 1975 did not state that a person had to be licenced under the Act in order to be charged with service tax and be liable to pay the service tax charged when it becomes due and payable. The learned SFC submits that by operation of law, where a person carries on the business of a restaurant outside a hotel providing or selling food and drink, and the annual sales revenue of the restaurant is more than the RM3 million threshold stipulated in Group C of the Second Schedule of the STA Regulations 1975, that person is a "taxable person" and is liable for service tax for the "taxable service" provided, namely the provision or selling of food and drink at the restaurant.

[16] With regards to the joint and several liability of the second and third appellants, the learned SFC submits that both the second and third appellants as directors of the first appellant are jointly and severally liable for the service tax due and payable by the first appellant pursuant to s. 17 of the STA 1975. He cites as authority *SH Ahmad Noordin SH Abdullah lwn. Pengarah Kastam Negeri Johor & Yang Lain* [2011] 6 CLJ 715; [2010] MLJU 2110; [2013] AMEJ 0331, where the High Court held that the directors of the company are jointly and severally liable for the service tax payable by the company pursuant to s. 17 of the STA 1975.

[17] As for the appellants' contention that the respondent cannot file a civil action against for service tax due and payable from a person unless that person is first found guilty of an offence under s. 29 or s. 32 of the STA 1975; and that under s. 40A of the STA 1975 it is the court that found the person guilty that shall order the convicted person to the Director General of Customs the amount of service tax due and payable, or any penalty payable under the Act; the learned SFC submits that the power to prosecute under the STA 1975 remains that of the Attorney General pursuant to art. 145 of the Federal Constitution, which states:

> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

[18] The learned SFC submits that in the event the Attorney General decides to prosecute a defaulter; upon conviction of the defaulter under ss. 29 or 32 of the STA 1975, such service tax due and payable or penalty payable under the Act shall be recoverable by the respondent under s. 40A of the STA 1975. Learned SFC submits that if the Attorney General decides not to use his power to prosecute a person under the STA 1975, it does not stop the respondent from claiming the unpaid service tax from the appellants through civil suit under s. 15(1) of the STA 1975.

The Law On Appellate Intervention In Respect Of Summary Judgments

[19] The learned SCJ's decision to grant judgment against the appellants in respect of the respondent's claim pursuant to O. 14 of the ROC and not after full trial. The law relating to summary judgment is well-settled. A judge may only enter summary judgment for a plaintiff's claim if the defendant does not have any defence or has not raised any issues or questions that ought to be tried. If the defendant has a defence to the plaintiff's claim or raises even a single *bona fide* issue to be tried by affidavit or otherwise, a court does not have the discretion to enter judgment summarily for the plaintiff's claim against the defendant: see *Noh Hyoung Seok v. Perwira Affin Bank Bhd* [2004] 2 CLJ 64; [2004] 2 MLJ 203; [2005] 3 AMR 655 (CA).

[20] In the hearing at the Sessions Court, the learned SCJ had held that the issues raised by the appellants were all questions of law and that there was no dispute as to the facts of the case. Based on the decision of the Supreme Court in *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182; [1987] 2 MLJ 183, the learned SCJ proceeded to decide on the question of law and granted summary judgment for the respondent's claim against the appellants.

[21] It is trite law that in an appeal on the judge's decision to use his discretion to allow or dismiss an application for summary judgment under O. 14 of Rules of the High Court 1980 previously, and currently under O. 14 of the ROC ("O. 14 appeal"), the appellate court should not regard the appeal as a review of the exercise of the judge's discretion but it should

approach the appeal as a re-hearing. In *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd*, Hashim Yeop A Sani SCJ (as he then was), delivering the judgment of the Supreme Court said the following as regards the approach to be taken by an appellate court in an O. 14 appeal:

> The approach to be taken by an appellate court in an Order 14 appeal has been settled. **The first principle is that the appeal court should not regard the appeal as a reviewing of the exercise of the judge's discretion but should in practice approach the appeal as rehearing**. This principle is already accepted by this court in *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300 which was also an Order 14 where this court considered and followed *European Asian Bank v. Punjab and Sind Bank* [1983] All ER 508, 516.
>
> (emphasis added)

[22] Similarly, in *United Malayan Banking Corporation Bhd v. Pembinaan KSY Sdn Bhd & Ors* [1993] 3 CLJ 612; [1993] 3 MLJ 45; [1993] 2 AMR 2169, the Supreme Court discussed the principles of interference by an appellate court in an O. 14 appeal. Mohamed Dzaiddin SCJ (as he then was) in dismissing the appeal, held:

> The approach to be taken by an appellate court in an Order 14 appeal has been settled. **The appellate court should not regard the appeal as reviewing the exercise of the judge's discretion but approach the appeal as a rehearing**. This principle was accepted by this court in *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* [1989] 1 CLJ 30; [1989] 2 CLJ (Rep) 1; [1989] 3 MLJ 164, following *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1984] 2 MLJ 300 and *European Asia Bank v. Punjab & Sind Bank (No 2)* (CA) [1983] 1 WLR 643; [1983] 2 All ER 508, 516.
>
> (emphasis added)

[23] Where the defendant raises a legal issue in its defence to the plaintiff's application for summary judgment under O. 14, the Supreme Court in *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* (*supra*), held that (i) the court hearing the O. 14 application should work within the framework of O. 14 and not O. 33 r. 2 of the Rules of the High Court 1980; and (ii) where the issue raised is solely a question of pure law and the facts are undisputed, the court should exercise its duty under O. 14 and decide on the question of law – even if the issue of law raised is a difficult one. If the court, after considering the argument, is satisfied that it is really unarguable then the court should grant summary judgment. On this legal principle, Hashim Yeop A Sani SCJ (as he then was) said:

> ... what happens when a legal issue is raised by the defence in an O. 14 application. In this regard several principles are involved. Firstly, the Court hearing an O. 14 application should work within the framework of O. 14 and not to embark in an exercise under O. 33 r. 2 which empowers the Court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before trial of the cause or matter. Order 33 r. 2 is entirely for a different purpose. Secondly,

A where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the Court should exercise its duty under O. 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the Court after considering the argument is satisfied that it is really unarguable then the Court should grant summary
B judgment.

[24] His Lordship cited with approval Goff LJ's *dicta* in *European Asian Bank v. Punjab and Sind Bank* [1983] 2 All ER 508 on the function of the appellate court in an O. 14 appeal, where Goff LJ held:

C But *where the appeal raises a question of law, this Court may be more ready to interfere. Moreover, at least since Cow v. Casey [1949] 1 All ER 197, [1949] 1 KB 474, this Court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under O. 14 even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'*. It may offend against the whole purpose of O. 14 not to decide a case which raises a
D clear-cut issue, when full argument has been addressed to the Court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a Judge, with the possibility of yet another appeal.

(emphasis added)

E **This Appeal**

[25] Hence, based on the afore-mentioned legal principles governing O. 14 appeals, this court must first, approach this appeal as a rehearing of the respondent's O. 14 application and not review the SCJ's exercise of his discretion; and secondly, decide whether or not the SCJ was plainly wrong
F (i) in deciding that the issues raised are solely questions of law pure and simple and that the facts are undisputed; and (ii) in concluding that:

17. Berdasarkan peruntukan di bawah Akta 151 dan Jadual Kedua, Peraturan 3 dan 4 Kumpulan C, Peraturan-Peraturan Cukai Perkhidmatan Mahkamah 1975 pihak Defendan dengan sendiri dianggap sebagai orang
G yang kena membayar cukai, oleh itu tidak berbangkit isu Defendan tidak mendaftar atau terkhilaf tidak mendaftar atau terkhilaf tidak mendaftar dan seterusnya tidak mendaftar dan seterusnya tidak dibenarkan mengutip cukai perkhidmatan dari pelanggan-pelanggan. Termaktub dalam Perenggan 2 Jadual Kedua Peraturan tersebut bahawa "Orang yang disebut di bawah tajuk Orang Yang Kena Membayar Cukai dalam mana-
H mana Kumpulan hendaklah mengenakan cukai perkhidmatan ke atas mana-mana perkhidmatan yang disediakan olehnya di bawah tajuk dalam Orang Yang Kena Membayar Cukai dalam Kumpulan itu.

18. Selanjutnya menurut Sekyen 17 Akta 151, Defendan Kedua dan Ketiga sebagai pengarah-pengarah bagi Defendan Pertama bertanggungjawab
I secara bersesama dan masing-masing untuk membayar cukai perkhidmatan, penalty dan surcaj bagi semua tempoh yang kena dibayar cukai.

Were The Issues Raised By The Appellants In The Order 14 Application Issues Of Law Only?

[26] In this appeal, learned counsel for the appellants submit that the issues that the appellants had raised in the Sessions Court were a mix of law and facts and should accordingly be decided at trial. Mr Sivabalan, states in para. 8 of his written submission that the issues of law and fact raised by the appellants are as below:

(i) whether the first appellant being an entity not licensed pursuant to section 6 of the STA 1975 is liable to pay the sum of RM822,582.38 to the respondent;

(ii) whether the first appellant need to be found guilty first in a criminal Court before a claim for the sum of RM822,582.38 can be made pursuant to section 40A of the STA 1975?;

(iii) whether the respondent can bypass the requirement of section 40A of the STA 1975 and make a civil claim direct for the sum of RM822,582.38?

(iv) whether the second and third appellant can be liable pursuant to section 17 of the STA 1975 when there is no finding of guilt of an offence?

(v) whether the first appellant had collected RM822,582.38 being service tax from its customer?

[27] From the issues raised by the appellants, issues (i) to (iv) are clearly issues of law and issue (v) is an issue of fact.

[28] However, with respect to learned counsel for the appellants, I find that issue (v) is not a triable issue as there is no dispute that the first appellant had not collected the sum of RM822,582.38 being service tax from its customers. The first appellant case is that since it is not licensed under the STA 1975, it cannot collect the service tax from its customers. The respondent does not dispute that the first appellant had not applied for a licence under the STA 1975 and had not collected the sum of RM822,582.38 from its customers.

[29] Accordingly, as there is no triable issue of fact, this court finds that the learned SCJ was correct in concluding that the issues raised by the appellants at the hearing of the respondent's O. 14 application were issues of law only.

Issues Of Law Raised By The Appellant

[30] As this court agrees with the learned SCJ that the issues raised by the appellants, in response to the respondent's application for summary judgment, were issues of law only and since this appeal is by way of a re-hearing, this court must go on to decide on the issues of law raised by the appellants: see *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* (*supra*).

A Whether The First Appellant Not Being A Person Licensed Under The STA 1975 Is Liable To Pay The Service Tax Of RM822,582.38 To The Respondent?

[31] The first issue of law raised by the appellants is whether the first appellant not being licensed under the STA 1975 is a "taxable person" under the STA 1975. The appellants argue that since the first appellant had not applied for a licence under the STA 1975 when it reached the RM3 million threshold, it is a "non-taxable person" and is thus, not liable to pay the service tax claimed by the respondent for the food and drink provided and sold at the first appellant's restaurant.

[32] Part 1 of the Interpretation Acts 1948 and 1967 (the "Interpretation Act") applies to the STA 1975, as it is an Act of Parliament enacted after 18 May 1967: see s. 2(1)(e) of the Interpretation Act.

[33] Section 17A of the Interpretation Act requires a purposive approach to be taken in the interpretation of a provision of an Act. Section 17A reads:

> 17A. Regard to be had to the purpose of Act
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[34] David Wong Dak Wah JCA (as he then was) in *Perantara Properties Sdn Bhd v. JMC-Kelana Square & Another Appeal* [2016] 5 CLJ 367, (CA) held that the starting point for a court in the interpretation of statute "must be s. 17A of the Interpretation Acts 1948 and 1967" and that "s. 17A embodies the concept of purposive approach which was explained by the House of Lords in *Pepper v. Hart* [1993] AC 593".

[35] The High Court had occasion to consider the STA 1975 in *Sarawak Shell Bhd & Anor v. Menteri Kewangan* [2001] 1 CLJ 694; [2001] 1 MLJ 602; [2001] 1 AMR 1212; [1997-2002] AMTC 2252. The issue to be determined by the court in that case was whether Sarawak Shell carried on the business of providing taxable service for the purposes of the STA 1975 within the scope of s. 7 of the Act. In that case Faiza Thamby Chik J held that the rule in *Pepper v. Hart* (*supra*) and the insertion of s. 17A into the Interpretation Act requires the court to consider the purpose of legislation even if such purpose is not expressed in the statute. His Lordship held that the clear purpose of legislation was to make "carrying on business" entrenched in the service tax legislation.

[36] The purpose of the STA 1975 is expressly stated in its preamble as "An Act to make provision of the charging, levying and collecting of service tax".

[37] Section 7 of the STA 1975 is the enabling provision that imposes a liability to service tax. It reads as follows:

> Subject to this Act, service tax shall be charged on and paid by any person (in this Act referred to as taxable person) who carries on business of providing taxable service referred to in section 3.

[38] Section 3 of STA 1975 stipulates that:

> Service tax shall be charged and levied in accordance with this Act on any taxable service provided by any taxable person.

[39] Section 2 of the STA 1975 defines "taxable person" as "any person who is prescribed to be a taxable person", and "taxable service" as "any service which is prescribed to be a taxable service". The taxable person and the taxable service in s. 3 of the STA 1975 is set out in the Second Schedule of the STA Regulations 1975. Regulation 3 of the STA Regulations 1975 states:

> The taxable service and taxable person referred to in section 3 of the Act shall be those set out in the Second Schedule.

[40] The High Court in *Sarawak Shell Bhd & Anor v. Menteri Kewangan* (*supra*) held that the schedules in the STA Regulations 1975 "are consequential provisions within the scope of the enabling provision" and that "for service tax to be chargeable ... the essential statutory requirement under the STA is that the applicants must carry on business of providing taxable service within the scope of enabling provision ie, s. 7 STA". It held that there are four relevant factors in determining whether a company is carrying on a particular business for the purposes of triggering the application of the s. 7 of the STA 1975, namely (i) profit motive; (ii) services provided to the public; (iii) activities which are part or in the course of a business constitute separate businesses; and (iv) principal or primary object for which the company was formed as set out in the memorandum of association.

When Does A Person Carrying On The Business Of Providing A Taxable Service Becomes A Taxable Person?

[41] It is clear from the plain reading of the provisions in the STA 1975 and the STA Regulations 1975 that whether a person is a taxable person depends on (i) whether it was carrying on a business providing taxable service; and (ii) whether its annual sales turnover of providing the taxable service reaches the threshold stipulated in the group for that taxable service in the Second Schedule of the STA Regulations 1975. If the answers to both questions are in the affirmative, that person is a taxable person. Section 7 of the STA 1975 expressly states that as a taxable person, it shall be charged service tax and it shall pay the service tax charged.

[42] Paragraphs 1 and 2 of the Second Schedule of the STA Regulations 1975 states:

> 1. The persons mentioned under the heading for Taxable Person in Groups A, B1, B2 C, D, E, E1, F and G of this Schedule providing any taxable service under the heading for Taxable Service in each Group shall apply for a licence provided that where two or more licences are required, regulation 4(1A) shall apply, for a licence.
>
> 2. The person mentioned under the heading for Taxable Person in any Group shall charge service tax on any service provided by him under the heading for Taxable Service in such Group.

[43] Group C of the Second Schedule of the STA Regulations 1975 stipulates that a restaurant located outside a hotel providing or selling among others, foods and drinks, with an annual sales turnover of more than RM3 million is a "taxable person" and the provision and sale of food and drinks is a "taxable service". Group C of the Second Schedule reads as follows:

Group C: Restaurants Located Outside Hotel

TAXABLE PERSON	TAXABLE SERVICE
1. *Any person operating one or more restaurants*, bars, snack-bars, coffee houses or places which provide food, drinks or tobacco products, whether wholly eat-in or partly take away, *having a total annual sales turnover, whether combined or singly, of more than RM3,000,000 of any one or more taxable services* mentioned within this Group and located outside a hotel excluding: i. a canteen located in an educational institution; or ii. a canteen operated by a religious institution or body. 2. Any person operating one or more food courts and having a total annual sales turnover, whether combined or singly, of more than RM3,000,000 of any one or more taxable services mentioned within this Group.	a. Provision or sale of food, drinks or tobacco products. b. Provision of services in form of "corkage", "towel charge"or "cover charge". c. Provision of premises for meetings or for promotion of cultural or fashion shows. d. Provision of parking spaces for motor vehicles where parking charges are imposed.

(emphasis added)

[44] "Annual sales turnover" is defined in reg. 2 of the STA Regulations 1975 as "in relation to any day of any month means the sales turnover made in the period of 12 months or part thereof immediately before that month". A

[45] The High Court in *Lai Ted Kong v. Menteri Kewangan* [2009] 5 CLJ 471; [2009] 3 AMR 617; [2009] AMTC 189; [2009] MLJU 134 laid down the criteria for a "taxable person" under Group C of the Second Schedule of the STA Regulations 1975. In that case, Lau Bee Lan J (as she then was) held that B

> A "taxable person" under Group C of the Second Schedule of the Regulations is: (i) any person operating; (ii) (a) one or more restaurants, bars, snack-bars, coffee-houses; or (b) places which provide food, drinks, or tobacco products, whether wholly eat-in or partly take-away, (c) a food court as defined in reg. 2 of the Regulations; (iii) where the total annual sales turnover of any one or more taxable services mentioned in Group C whether combined or singly exceeded RM500,000; and (iv) all the aforesaid persons as described have to be located outside a hotel. The two categories excluded as a "taxable person" are when a person is operating a canteen located in an educational institution or a canteen operated by a religious institution or body. C D

[46] Since the decision in *Lai Ted Kong (supra)*, the threshold in Group C was amended twice. It was reduced from RM500,000 to RM300,000 by the Service Tax (Amendment) (No. 7) Regulations 2001, and the threshold of RM300,000 was increased to RM3 million by the Service Tax (Amendment) Regulations 2008. E

[47] Thus, whether or not a restaurant operating outside a hotel is a "taxable person" depends on whether (i) it provides or sells food, drinks or tobacco products, whether wholly eat-in or partly take-away, and (ii) whether the total annual sales turnover of any one or more taxable services mentioned in Group C whether combined or singly is more than RM3 million. F

[48] In this instant case, the first appellant operates a restaurant located outside a hotel providing or selling food and drinks. It is not disputed that the provision or sale of food and drinks is a taxable service. It is also not disputed that the first appellant's annual sales turnover for providing or selling food and drink at its restaurant for the 12 months before September 2012 was RM3,078,981.42, which is above the RM3 million threshold for taxable service stated in Group C of the Second Schedule of the STA Regulations 1975. The appellants had admitted in their defence and in their affidavit-in-reply that the first appellants' annual sales turnover for the period of 12 months immediately before September 2012 was more than RM3 million. G H

[49] Accordingly, pursuant to s. 3 of the STA 1975, reg. 3 of the STA Regulations 1975, and Group C of the Second Schedule of the STA Regulations 1975, the first appellant once it reaches the threshold of RM3 million, becomes a taxable person. I

A **Requirements Of A "Taxable Person" Under The STA 1975 In Carrying On The Business Of Providing "Taxable Services"**

[50] First, once a person is prescribed as a "taxable person" under the STA 1975, that person is required under s. 8 of the Act to apply for a licence in order to carry on his business of providing taxable service.

B

[51] A licence under s. 8 of the STA 1975 is a prerequisite for a taxable person to carry on the business of providing a taxable service. Section 8(1) of the STA 1975 requires every taxable person providing a taxable service to apply for a licence. A taxable person cannot carry on its business of providing taxable service unless it is in possession of a licence issued by the
C Director General of Customs under s. 8(2) of the Act.

[52] Pursuant to s. 8 of the STA 1975 and reg. 4 and para. 1 of the Second Schedule of the STA Regulations 1975, as a taxable person carrying on a business of providing taxable service, the first appellant must apply to the
D senior officer of Customs in Form JKED No. 1 for a licence. Section 8(1) of the STA 1975 expressly states that no taxable person shall carry on such a business of providing taxable services unless he is in possession of a licence issued under s. 8(2) of the Act.

[53] Secondly, every taxable person who provides a taxable service is
E required pursuant to s. 10(1) of the STA 1975 to "issue an invoice and a receipt in the national language or in the English language to the customer in respect of the transaction and shall state in the invoice and receipt the amount of service tax payable separately from the charges for the taxable service provided". Section 10(2) of the STA 1975 expressly states that the
F taxable person may recover the amount of service tax payable from its customer.

[54] Thirdly, every taxable person is required under s. 12(1) of the STA 1975 to furnish his returns to the proper office of the respondent within 28 days (or such other extended period as agreed by the Director General
G of Customs) after the end of each taxable period. The returns must be in the prescribed form setting (i) the aggregate amount of proceeds received during the taxable period in respect of the charges levied or collected for providing the taxable service; (ii) the service tax payable; and (iii) such other particulars as may be required by the Director General of Customs. The taxable person
H must verify the returns by a declaration in the prescribed form.

[55] "Taxable period" is defined in s. 2 of the STA 1975 as "subject to sub-s. 12(2), two calendar months or part thereof ending on the last day of the second calendar month". Section 12(2) of the STA 1975 states:

I (2) For the purposes of this section:

(a) where a taxable person closes his monthly business account on a date other than the last day of a calendar month, the taxable period shall be the period of two months ending on that date;

(b) the last taxable period is the period of two calendar months or part of it ending on the day the taxable person ceases to carry on the business of providing taxable service or to be a taxable person or the day the taxable person's licence is suspended or revoked by the Director General.

[56] Fourthly, pursuant to s. 7 of the STA 1975, the taxable person must pay the service tax charged on him under s. 3 of the Act for providing the taxable service.

[57] Section 14(3) of the STA 1975 states that the service tax due during any taxable period shall be payable to the Director General of Customs within 28 days from the expiration of that taxable period.

[58] The Director General of Customs is empowered under s. 19 of the STA 1975 to collect the service tax due and payable from persons owing money to the taxable person.

[59] Under s. 20 of the STA 1975, where a demand is made by the respondent within three years from the date on which the service tax is payable, the person liable to pay the service tax must pay the service tax.

[60] Learned counsel for the appellants, Mr Sivabalan, argues that the respondent's action against the first appellant is premised on the fact that the first appellant had short paid the service tax. He states in para. 20 of the appellants' written submission "s. 20 of the Service Tax Act 1975 is only applicable if you are licensed by the respondent and you had short paid the respondent". Mr Sivabalan submits that the respondent's notice of demand does not make sense since the first appellant had not made any payment of service tax to the respondent. In para. 2 of the notice of demand, the respondent wrote as follows:

2. Tuntutan ini dikeluarkan atas sebab-sebab berikut:

Syarikat kurang bayar cukai perkhidmatan bagi tempoh Oktober 2021 hingga Mac 2015 di bawah Akta ini sepertimana jadual pengiraan di Lampiran AP

[61] With respect to learned counsel for the appellants, I find his interpretation of s. 20 of the STA 1975 is misconceived. Section 20(1) of the STA 1975 reads as follows:

(1) **Where:**

(a) **the whole or any part of any service tax, penalty or other moneys payable under this Act has not been paid**; or

(b) the whole or any part of any service tax, penalty or other moneys after having been paid has been erroneously refunded,

A **then, provided a demand is made within three years from the date on which the service tax, penalty or other moneys were payable**, or the deficient service tax, penalty or other moneys were paid, or the refund was made, as the case may be, **the person**:

(aa) **liable to pay**:

B (i) **the service tax, penalty or other moneys**; or

(ii) the deficient service tax, penalty or other moneys; or

(bb) to whom the refund was erroneously made,

shall pay the service tax, penalty or other moneys, or the deficient service
C **tax, penalty or other moneys, or repay the refund erroneously paid to him, as the case may be**.

(emphasis added)

[62] From the words emphasised above, it is clear that under s. 20 of the
D STA 1975, where the whole or any part of the service tax payable has not been paid (and not just where part of the service tax payable has not been paid as argued by the appellants' counsel), provided a demand is made within three years from the date on which the service tax is payable, the person liable to pay the service tax shall pay the service tax.

E **[63]** Who is the person liable to pay the service tax? It is clear from s. 7 of the Act that it is the "taxable person".

[64] And who is the "taxable person" in respect of a restaurant outside a hotel providing and selling food and drinks? Pursuant to s. 3 of the STA 1975 and reg. 3 and Group C of the Second Schedule of the STA Regulations 1975,
F it is the person operating one or more restaurants having a total annual sales turnover of more than RM3 million. What is clear from the plain reading of the provisions of the STA 1975 and the STA Regulations 1975 is that once a person operating a restaurant outside a hotel reaches the threshold of RM3 million, that person becomes a "taxable person". As a taxable person, that
G person is obliged to apply for a licence and be licensed under the STA 1975 in order to carry on its business of providing taxable services; it has to issue an invoice and receipt to its customers in respect of the taxable service provided and he must state on the invoice and receipt the charges for the taxable service provided separately from the amount of service tax payable;
H it has to submit its sales returns to the respondent at the end of every taxable period; and it must pay the service tax due when it becomes payable.

[65] The fact that the first appellant did not apply for a licence under s. 8 of the STA 1975 and carried out providing the "taxable service" at its restaurant means that it guilty of an offence against the STA 1975: see s. 29
I of the Act. It does not mean that it is a non-taxable person.

[66] Paragraph 2 of the Second Schedule of the STA Regulations 1975 stipulates a "taxable person" shall charge service tax on any "taxable service". Section 10(2) of the STA 1975 allows the taxable person to recover the service tax payable from its customer. The fact that the first appellant did not charge the service tax payable on its customers for the food and drink sold to the customers does not mean that service tax is not payable by the first appellant. Section 14 of the STA 1975 states that the service tax chargeable on the taxable person under the Act shall be due at the time when payment is received for the taxable service provided to the customer by the taxable person. Hence, service tax is due from the first appellant at the time it received payment for the food and drink sold from its customers.

[67] For these reasons, I cannot agree with the appellants' counsel argument that because the first appellant did not apply for a licence it cannot collect the payment of the service tax from its customers and it is therefore, a non-taxable person.

[68] Nowhere does it state that in the STA 1975 or the STA Regulations 1975 that a person operating a restaurant outside a hotel shall only be a "taxable person" after it is licensed under the Act and that the respondent may only claim payment for the service tax due and payable for the food and drinks sold after the restaurant operator has been licensed under the Act. If learned counsel for the appellants' argument is taken to its logical conclusion, it means that all providers of taxable services would not apply for a licence under the STA 1975 because if they do not apply for a licence despite meeting the requisite monetary threshold, they would not be a taxable person and would not have to pay any service tax for the taxable services they provide. Surely that cannot be the intention of Parliament when it enacted the STA 1975. Service tax – like the goods and services tax and the sales tax that replaced it – is a form of indirect taxation, which is a source of revenue for the respondent.

Can The Respondent Recover Service Tax Due And Payable From A Taxable Person Only After The Person Has Been Convicted Of An Offence Under The STA 1975?

[69] The second issue of law raised by the appellants is their contention that the respondent cannot file a civil claim against the appellants for recovery of the unpaid service tax until the first appellant is convicted of an offence under s. 29 of the STA 1975 and that pursuant to s. 40A of the Act, it is the court that found the person guilty that can order the person to pay to the respondent the amount of service tax due and payable and any penalty under the Act.

[70] With respect, I find that the argument put forward by the appellants to be unsupported by the words in ss. 29 and 15(1) the STA 1975.

Section 29 of the STA 1975 expressly states:

> 29. Failure to comply with notice, etc.
>
> Without prejudice to any other liability incurred under this Act, any person who:
>
> (a) fails or refuses to comply with the requirements of section 7, 7A, 8, 10, 10A, 11, 12, 14 or 19;
>
> ...
>
> shall be guilty of an offence against this Act, and shall be liable on conviction to a fine not exceeding five thousand dollars or to imprisonment not exceeding two years or to both.

Section 15(1) of the STA 1975 expressly states:

> 15. Recovery of tax
>
> (1) **Without prejudice to any remedy**, any service tax due and payable and any penalty or surcharge payable under this Act may be recovered as a civil debt due to the Government.
>
> (emphasis added)

[71] Section 15(1) of the STA 1975 is a provision that empowers the respondent to recover any service tax due and payable as a civil debt due to the respondent. It permits the respondent to recover the service tax due and payable by way of a civil action against the taxable person. This is similar to the powers accorded to the respondent under the Income Tax Act 1967 to recover income tax due and payable by way of a civil action against a taxpayer.

[72] Whereas, s. 29 of the STA 1975 makes it a criminal offence for any person who, among others, fails or refuses to comply with the requirements in ss. 7, 7A, 8, 10, 10A, 11, 12, 14 or 19 of the Act, ie, a taxable person who refuses or fails (i) to pay service tax charged under the Act under s. 7; (ii) to comply with the directions of the Director General of Customs under s. 7A; (iii) to apply for a licence to carry on his business of providing a taxable services under s. 8; (iv) to issue an invoice and a receipt to the customer in respect of the transaction and to state in the invoice and receipt the amount of service tax payable separately from the charges for the taxable service provided under s. 10; (v) to keep such books of account or other records as the Director General may direct, full and true records written up to date of all transactions which affect or may affect his liability to service tax and shall keep those books of account or other records in the National Language or English under s. 11; (vi) to furnish its returns at the end of each taxable period under s. 12; and (vii) to pay the service tax due and payable within 28 days from the expiration of any taxable period under s. 14. Section 29 also makes it a criminal offence for a person owing money to a taxable person to not pay to the Director General of Customs, upon receipt of a notice in writing from the Director General under s. 19 of the STA 1975, such money as is sufficient to pay the sum of service tax, penalty or surcharge due and payable by the taxable person.

[73] From the plain reading of both these sections, it is clear that s. 15(1) of the STA 1975 is a statutory provision enabling the respondent to recover any service charge due and payable by way of a civil action. And that s. 29 of the Act makes it a criminal offence for a taxable person not to pay the service charge due and payable for the taxable services provided.

[74] Section 40A was added to the STA 1975 by the Service Tax (Amendment) Act 1999 to empower the court, which convicted a person of an offence under ss. 29 or 32 of the Act, to order the convicted person to pay the service tax due and payable, or any penalty payable under the STA 1975, to the Director General of Customs.

[75] I find that the appellants' argument that the wordings in s. 40A of the STA 1975 means that the respondent cannot recover the amount of service tax due and payable by a taxable person as a civil debt unless the person is first convicted under s. 29 of the Act to be unsupported by the wordings in the Act. If it is indeed the intention of Parliament when it introduced s. 40A in the STA 1975 was that the respondent may only claim the service tax due and payable as a civil debt after the taxable person is convicted under s. 29, it would have made consequential amendments to s. 15 of the Act to expressly state that the respondent's right to recover from a taxable person the service charge due and payable as a civil debt to it, is subject to the conviction of the taxable person of an offence under s. 29.

[76] In the absence of express words in the STA 1975 that the respondent's right to recover any service charge due and payable as a civil debt is subject to the criminal conviction of the taxable person, I cannot agree with the appellants' contention that in order for the respondent to bring a civil suit for the recovery of the service due and payable, the first appellant must first be convicted under s. 29 of the STA 1975 and only the court which had convicted the first appellant of the offence can order it to pay the respondent the service charge due and payable. For this court to agree with the appellants' contention, would require this court to give the words in ss. 15, 29 and 40A of the STA 1975 strained and unnatural meanings. As held by High Court in *Sarawak Shell Bhd & Anor v Menteri Kewangan* (*supra*),

> ... it is not the function of the court of law to give to words a strained and unnatural meaning only to apply a taxing section which had the legislature thought of it, would have been covered by appropriate words.

Decision

[77] For the reasons above, I find that the learned SCJ had not erred in his findings on the questions of law raised by the appellants. I also find that the learned SCJ was not wrong in allowing the respondent's application for summary judgment under O. 14 of the ROC for its claim against the appellants.

[78] Accordingly, the appellants' appeal is dismissed with costs.